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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. AUKUSITINO JESUS AFAMASAGA, Defendant and Appellant.	A118981 (Solano County Super. Ct. No. VCR174376)

A jury convicted defendant Aukusitino Jesus Afamasaga of second degree murder (Pen. Code, § 187, subd. (a)) and assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)).[1] The jury also found true the allegation that defendant had suffered a prior serious felony conviction. (§ 667, subds. (a)(1), (b)-(i)). The trial court sentenced defendant to an indeterminate term of 30 years to life for the second degree murder and imposed a consecutive, determinate term of eight years, comprised of three years for the assault and five years for the prior conviction enhancement.

Defendant raises numerous claims on appeal, including instructional and evidentiary errors, as well as prosecutorial misconduct, ineffective assistance of counsel and sentencing error. Defendant further claims that the trial court violated his due process right to a fair trial by authorizing a bailiff to stand near him during his testimony. Finding no reversible error, we affirm the judgment.

[1] All further undesignated statutory references are to the Penal Code.

I. EVIDENCE AT TRIAL

A. Prosecution's Case

1. The Murder

Defendant had been in a tumultuous on-again, off-again relationship with the victim, 28-year-old Alicia Loza,[2] for several years. The relationship came to an end on the evening of July 24, 2004, when defendant killed Alicia. On the night in question, the couple had drinks at a bar and then went to visit Alicia's cousin. They then went to the Vallejo Inn where Alicia had rented a room. On the way to the motel, defendant severely beat Alicia, splitting her lip. When defendant drove into the motel parking lot, Alicia jumped out of the car and sought help from a motel guest and the manager. Defendant grabbed Alicia and forced her back into the car, and then drove to another location. While parked in the car, defendant continued to beat Alicia and eventually put her into a headlock and choked her for more than a minute and a half, causing her death. Defendant then drove around with Alicia's decomposing body in the front passenger seat for three days. Defendant was ultimately apprehended by the police and charged with first degree murder and assault likely to produce great bodily injury.

2. Defendant's Relationship with Alicia

Alicia's mother, Elisa Loza, testified that she had known defendant, nicknamed "Tino," for about 27 years. Elisa testified that the relationship between Alicia and defendant was "no good." Elisa knew they had an on-again, off-gain relationship. Although Elisa and Alicia lived together and they had a very close relationship, Elisa did not know that Alicia had been dating defendant in July 2004. Elisa testified that she did not approve of Alicia's relationship with defendant.

Veronica Loza, Alicia's cousin, knew that defendant and Alicia had been dating each other in July of 2004. Veronica thought Alicia had been defendant's girlfriend for a couple of months. She also thought there were times when defendant and Alicia were

[2] Because several witnesses from the victim's family share the same last name, we shall refer to members of the Loza family by their first names for purposes of clarity and intend no disrespect.

together and other times when they were "split up." Veronica's sister, Yvette Loza, also knew about Alicia's on and off again relationship with defendant. A week before her disappearance, Alicia mentioned to Veronica that defendant told her that "he was going to do a Lacy Peterson on her [Alicia] and none of her family would be able to find her." Alicia told Veronica that she was afraid.

3. Events of July 24, 2004

On Saturday July 24, 2004, Alicia and her family were preparing for Veronica's baby shower, which was set for the following day. That day Alicia picked up Yvette to do some shopping for the baby shower. Alicia brought Yvette home around 3:30 or 4:00 p.m.

Alicia returned home around 6:30 p.m. Elisa saw Alicia go upstairs, but she never heard her come back downstairs. Elisa called Alicia's name three times. A visiting friend told Elisa that Alicia was not there and that defendant was outside in Alicia's car. Elisa expected Alicia to return home that evening, but she never did.

At some point on July 24, 2004, Alicia checked into the Vallejo Inn. Then, around 11:30 p.m., Alicia and defendant went to Veronica's house. Veronica's boyfriend Daniel, her sister Mia Desyo, and Daniel's friend Nacho were also at the house. Defendant and Alicia stayed at Veronica's house for about 30 minutes; they were drinking and talking about Veronica's baby shower. Mia testified that she did not hear any disagreement between Alicia and defendant. Alicia seemed happy and asked Veronica to take some pictures with a disposable camera. Although defendant and Alicia had been drinking, neither appeared to be drunk. Before they left, Alicia asked to borrow a radio and Veronica loaned one to her.

Later that evening, Christopher Mun, the manager at the Vallejo Inn, heard arguing at the motel and decided to go outside. He saw that several guests were standing near the building and looking at Alicia, who appeared to be "arguing with her boyfriend." When Mun came out of the office, he heard the sound of a woman crying and then he saw Alicia, accompanied by another guest, walking toward him. Mun could see that Alicia's lip was "busted open," and he heard her say, " 'You are not going to hit me

again. This is the last time.' " Alicia was walking away from a white car, and she was yelling at someone inside the car. Alicia got within a couple of feet of Mun. Mun asked her approximately three times if she wanted him to call the police; Alicia declined each time. Then, defendant got out the car, walked behind Alicia and put his arms around her. Mun heard defendant say, in a commanding voice, " 'Let's go mommy.' " Mun then saw defendant pick up Alicia and carry her toward the car. During this time, Alicia was crying and repeatedly saying, " 'You are not going to do it again. You are not going to hit me.' " Alicia got back into the passenger seat, and defendant "peeled" out of the parking lot.

Geri Santiago was at the Vallejo Inn on July 24, 2004, when she heard a scream. She then saw Alicia jump out of a white Solara. Alicia grabbed onto Santiago, swung her around, and said, " 'Call the police.' " As Santiago grabbed Alicia, defendant jumped out of the car and said, " 'Alicia.' " Santiago asked defendant, " 'Why would you hit her?' " He just looked at Santiago. Santiago turned around, grabbed Alicia and walked her to the office. Once at the office, Santiago told the manager to call the police for Alicia. Alicia would not let Santiago leave. Santiago told Alicia that she was going to her room and would "be right back." Santiago put Alicia's hand in the manager's hands and told her, " 'You stay right here. I will be right back.' " Santiago went to her room and quickly returned to the office. However, Alicia was no longer in the office. When Santiago asked where Alicia was, the manager replied that the defendant entered the office, "grabbed her by the arms and walked her out and put her in the car."

James Rasmussen was at the Vallejo Inn on July 24, 2004, when he noticed that a man appeared to have hit a woman in the mouth and that she was crying and screaming for help as she got out of a white car. He saw blood on her mouth and he saw another woman taking her to the office to call the police. According to Rasmussen, the women were about halfway to the office when a man approached them. The man "talked" the injured woman out of calling the police, telling her not to call the police and saying that he loved her and he was sorry. The man then held onto the injured woman's hand and walked her back to a white car. Rasmussen told the police that the man appeared to be

"pushing" the injured woman toward the car. The man got in the driver's seat and the woman sat in the front passenger seat.

4. Alicia's Disappearance

Santiago testified that two days after the incident at the Vallejo Inn, she saw defendant in a white Solara at a gas station across the street from the motel. Santiago was using the phone, when she noticed defendant staring at her. Defendant drove up to her, and she noticed that the "passenger seat was down." Santiago saw "white bloody clothes covering something," and she "kept looking [until she] saw a piece of hip," that was "purple" and "had stunk." She looked at defendant and saw "two scratches coming down his face." She told him, " 'That is a dead body.' " Defendant said, " 'Those are my clothes.' " Santiago replied, " 'Okay. We'll leave it at that.' "

Alicia's family became concerned when she failed to show up for the baby shower on Sunday, July 25, 2004. Elisa called Veronica and told her that Alicia had not shown up for work on Monday or Tuesday, and she had not been home since Saturday. It was unusual for Alicia to be gone all weekend without calling her mother. It was also "very unusual" for Alicia not to report for work, as she was "extremely reliable and conscientious." Veronica knew that something was wrong because it "wasn't like [Alicia]" to not show up for work and fail to check in at home.

Veronica and Mia went out to search for Alicia on Tuesday, July 27, 2004. They drove to defendant's halfway house, but he was not there. About five minutes later, defendant suddenly drove up in Alicia's car. He looked over at the sisters and he appeared to be banging his head on the steering wheel. Mia noticed that defendant had "scratches all over his face," and he was wearing the same clothes he had on Saturday night, which were now dirty.

Veronica walked up to the driver's side and said, " 'Where is my cousin? She's been missing.' " Defendant said that he had dropped Alicia off at her mom's house; he also said that he had dropped her off with her friends. During this exchange, Veronica called Elisa, who confirmed that Alicia was not with her. As defendant spoke with Elisa on the phone, Veronica and Mia noticed that the passenger seat was completely reclined

and covered with a pile of clothes. Veronica leaned into the car and saw Alicia's hip and bruised arm. Veronica then said, " 'What did you do to her? You killed her.' " Defendant denied killing Alicia and started "freaking out," saying, " 'Oh, my gosh. I'm going to take her to the hospital.' " Defendant then reversed quickly and took off with Veronica still leaning into the car. Veronica, then nine months pregnant and due at any time, fell to her knees. Defendant drove to the top of the hill and stayed there for about 5 to 10 seconds, and he looked at Veronica and Mia in a "real evil" manner. Veronica and Mia tried to follow defendant in Veronica's van, but they lost him.

Later that afternoon, Yvette and Daniel drove around in Richmond, San Pablo, and Rodeo, looking for Alicia's car. Around 5:30 p.m., Yvette saw defendant driving Alicia's white Solara on Tank Farm Road in San Pablo. When defendant stopped at a red light, Daniel used a brick to break the Solara's back window in hopes of attracting the police's attention. As Yvette's van was almost next to the Solara at another red light, she asked defendant where Alicia was and what he had done with her. He replied, " 'She's right here. She's right here.' " As defendant drove off, Yvette flagged down a sheriff, who activated his lights and sirens and followed the Solara. Defendant did not immediately pull over. When he finally stopped, defendant got out the car and was told to put his hands up. Defendant complied for a few seconds and then ran into an apartment building. As defendant took off running, Yvette ran to the car and opened the driver's door. She saw a pile of clothes on the passenger seat, which was fully reclined, and "an arm hanging [out]." Yvette could see bruises on the sides of the arm. Yvette then pulled back some of the clothes and saw Alicia's body. Yvette knew it was Alicia, but her face was unrecognizable.

5. Police Investigation

On the afternoon of July 27, 2004, Contra Costa County Sheriff's Deputy Robert Jimenez was on duty at the intersection of Richmond Parkway and San Pablo Avenue in Richmond, when he heard yelling and a horn honking. He saw two people in a blue minivan yelling and screaming and pointing at a white Toyota Solara in front of them. Jimenez followed the two vehicles and pulled up next to the minivan. The man in the

passenger seat leaned out of the window, pointed to the white car and said, " 'Stop that car, stop that car.' " Jimenez activated his patrol car's lights and sirens, but defendant did not pull over. When defendant did pull over he jumped out of the car and looked like he was going to surrender. At that point defendant's eyes "lit up," and Jimenez saw a woman running on the sidewalk. Defendant turned around and started to run away from Jimenez. Jimenez told defendant to stop, but he kept running. Jimenez then heard the woman scream, " 'Oh, my God. Oh, my God.' " He went to the driver's side of the white car, looked in and saw "a deceased female in the passenger seat."

Contra Costa County Sheriff's Deputy Tim Allen arrived at the scene and assisted Jimenez in the search for defendant. Allen found defendant hiding in a bush. Allen drew his gun and ordered defendant out of the bush several times. As Allen got closer to the bush, defendant stuck his hands out. Allen pulled defendant out the bush and attempted to handcuff defendant. Defendant resisted Allen's efforts to handcuff him, prompting Allen to strike defendant several times with his fists. Even after being handcuffed, defendant continued to resist, kick, and flail around. Eventually, defendant was subdued after several officers assisted in placing him in "a wrap."

Vallejo Police Officer Steven Cheatham showed Mun two photographic lineups during the police investigation. The first lineup included a photograph of Alicia in position number four. Mun identified Alicia as the victim he saw assaulted at the Vallejo Inn. The second lineup contained a photograph of defendant in position number six. Mun identified defendant as the person who assaulted Alicia.

As part of the investigation, Cheatham collected evidence from the white Solara. The evidence included a disposable camera; Cheatham arranged for the film on the camera to be developed. In August 2006, Cheatham reexamined the interior of the car and recovered a white, cylindrical object. Cheatham described it as an asthma inhaler that is used to disperse medication. Cheatham explained that the inhaler was not originally seized from the car in July 2004 because after speaking with all of the witnesses, including defendant, Cheatham had no reason to believe that it would become evidence in the case.

Alex Taflya, a criminalist with the Contra Costa County Sheriff's Department crime lab, testified as an expert in crime scene processing and blood spatter evidence. Around 6:00 p.m. on July 27, 2004, Taflya arrived at the 2000 block of Stanton Avenue in San Pablo to process the crime scene. He saw a badly decomposed body, partially covered with clothing, in the front passenger seat of the white Toyota Solara. He noticed medium velocity blood spatter on the ceiling on the passenger side, which was indicative of someone on the passenger side being stomped on or beaten. There were some blood contact transfers on the driver's side of the car, but no blood spatter on that side. The bloodstains on the victim's shirt indicated that she was sitting upright at the time of the injuries.

6. Forensic Evidence

Arnold Josselson, M.D., a forensic pathologist, performed an autopsy on Alicia on the morning of July 28, 2004. Dr. Josselson explained that Alicia was in a "moderate state of decomposition," which meant she had been dead three or four days before the autopsy. He observed numerous external injuries, including lacerations on Alicia's chin, under her left eye, and under her left eyelid, which were indicative of blunt force trauma. There were also numerous red and purple bruises on Alicia's hands and arms, which were consistent with defensive wounds.

An internal examination revealed a small fracture in Alicia's larynx or voice box in the area of the thyroid cartilage. Dr. Josselson opined that the cause of death was asphyxia or lack of oxygen "due to strangulation" as a result of "pressure on the neck." Dr. Josselson explained that the strangulation was done by the arm or "yoking," which he opined was the underlying cause of death. He noted that the absence of petechial hemorrhages, which are small hemorrhages often visible in the whites of the eyes or on the face in asphyxial deaths, was not unusual in yoking deaths. Dr. Josselson explained that the absence or presence of petechial hemorrhages did nothing to prove or disprove an asphyxial death. Rather, petechial hemorrhages are "non-specific for asphyxia strangulation deaths," and "can be seen in natural deaths such as heart attacks."

Dr. Josselson further stated that "[i]t's just a fact that petechia are almost never found with yoking."

Dr. Josselson noted that Alicia's hyoid bone, the small horseshoe bone above the voice box, was not fractured. He explained that this absence was not unusual because manual strangulations often do not involve a hyoid bone fracture. Indeed, such a fracture would be very unusual in cases where an arm, rather than the hands, is used for strangulation.

Dr. Josselson testified that generally "it would take [10] to [15] seconds for someone to lose consciousness when they are being strangled." He estimated that if the pressure were released after 10 seconds, it would take about 20 to 30 seconds for a person to regain consciousness. A person would be dead if they were strangled for a minute or minute and a half. Dr. Josselson explained that death occurs because the major blood vessels on the sides of the neck, which supply blood to the brain, are "occluded" or blocked when there is pressure on the neck. It takes about 10 pounds of pressure on the neck to occlude those vessels after 10 seconds. Additionally, if the lack of oxygen continued for a minute or so, the brain would stop telling the heart to keep beating, which would result in death.

Dr. Josselson testified there was no evidence that Alicia choked on vomit. Also, he did not see any changes in her lungs indicating that she died from asthma. Indeed, there was no evidence to suggest anything other than strangulation as the cause of death.

B. Defense Case

1. Defendant's Testimony

Defendant testified that he met Alicia in or about 1993. They began dating in 2001. Prior to that time, Alicia had dated a man named "Ray" for about three years. Between 2001 and 2004, defendant and Alicia had an on again, off again relationship.

On Friday, July 23, 2004, Alicia picked up defendant after she finished work. After doing various errands, they decided to get a room at the Vallejo Inn and they spent the night there. The next day, Alicia dropped defendant off at his cousin Joe Hernandez's house. Defendant and Hernandez went shopping in Richmond; they then went to

Hernandez's church where they "sort of fellowshipped for a while." They returned to Hernandez's house, where defendant consumed two to three mixed drinks. By the time Alicia had returned, defendant was "feeling the alcohol." Alicia helped defendant finish the drink he had in his glass; defendant then made another drink for himself and one for Alicia. They finished their drinks and left when Hernandez's girlfriend arrived.

Defendant and Alicia then drove four or five miles to the Warehouse Café, a bar in Port Costa. There, they each drank about three drinks. Before leaving the bar, they decided to stay at the motel for another night.

Around 9:00 p.m., defendant and Alicia stopped at Safeway, where they bought a fifth of Seagram's gin, club soda, punch and some snacks. They also stopped at Alicia's house and she picked up some clothes. When they returned to the Vallejo Inn, they stayed in their room for about two hours, where they each drank three or four "really small" mixed drinks. At some point, Alicia decided she wanted to borrow a radio from Veronica, who lived near the motel.

Before going to Veronica's house, defendant decided to drive to Crystal Point, "a romantic area" overlooking the water and "the Carquinez Strait." They took photographs of each other. There was a photograph of Alicia, holding a mixed drink in her hand. Defendant and Alicia both had been drinking and they were in "a good mood."

After taking the photographs, defendant and Alicia went to Veronica's house, where they found Veronica, her boyfriend Daniel, her sister Mia, and a friend named Nacho. Someone took photographs in the apartment. Defendant and Alicia looked "happy" in the photographs. Defendant said that he believed he was "pretty intoxicated" at the time the photograph was taken.

The otherwise happy mood in the apartment changed when Alicia began talking with Nacho, who had been Ray's best friend. Alicia had not seen Nacho since Ray's funeral. Defendant explained that Alicia blamed him (defendant) for Ray's suicide in 2001, and that was a "big issue" between them. During the conversation with Nacho, Alicia began yelling and pointing at defendant. Alicia said that she could not understand why Ray committed suicide and that it was all defendant's fault. She believed that the

suicide happened because she started dating defendant. Defendant, however, did not even know Ray and he believed he was not responsible for Ray's death. After that, defendant remembered leaving with Alicia. There was tension between defendant and Alicia as they left Veronica's apartment.

During the drive back to the motel, Alicia was yelling and "getting really upset." As they parked in the motel parking lot, Alicia continued to yell at defendant. Alicia hit defendant in the face, which took him by surprise. Defendant then hit Alicia "in the head somewhere" or possibly in the face with the back of his hand. Defendant said "[i]t was pretty much a cat fight" after that, with Alicia screaming and scratching him. After arguing with defendant for about 10 to 20 minutes, Alicia got out of the car. Defendant followed her, saying " 'Come on babe, let's go. I mean this is unnecessary. We can talk about it' " or " 'Come on babe, come on momma.' "

Defendant initially testified that he did not recall seeing anyone in the parking lot. However, he later admitted that he hit Alicia "hard" at the Vallejo Inn in front of several people. Defendant did not recall seeing any blood on Alicia's face when she left the car or when she returned to it. As defendant drove away from the motel, Alicia was "really angry," "yelling and screaming" and hitting and slapping defendant. Defendant said that Alicia was "really intoxicated." At one point, Alicia tried to get out of the car while it was moving. Defendant thought she was trying to commit suicide because she had once asked him if he would attend her funeral if she committed suicide. Defendant stopped the car in the middle of the freeway and pulled Alicia back inside.

Defendant then drove to his best friend Randy Brook's house in Rodeo. Brook had helped defendant when he had problems in other relationships. Defendant had planned to ask Brook if he could spend the night and to "let [Alicia] go home." Instead, defendant and Alicia sat in the car, arguing and yelling at each other. Alicia hit him several times and he responded by slapping her. As defendant was "pretty intoxicated," he could have hit Alicia with a closed fist. He explained that he did not "normally hit her like that" and it was "something [he] wouldn't do to a woman." Alicia continued to slap, scratch, and do "all different kinds" of crazy things.

At some point, they stopped hitting each other. Defendant was leaning on the door when "out of nowhere" Alicia "hit [him] in the head so hard," that he was "kind of blinded, dizzy." He was not certain about what Alicia had used to hit him, but knew it was "really something blunt" and "hard." Defendant then grabbed Alicia by her arms. He said she was "kind of going crazy and swinging and stuff like that." Defendant raised his arms and "ended up with [his] hands around her head [and] around her ears . . . ." As he had her in a headlock, he told Alicia to calm down. Defendant was able to restrain Alicia and then he released her when he felt her body jerking. Alicia vomited as soon as defendant let her go. Her breathing was "kind of [a] deep wheezing sound." Defendant thought Alicia was having an asthma attack. He believed he gave Alicia her asthma pump. He believed she grabbed the pump, but he did not see her use it. The asthma pump fell from Alicia's hand as she held her throat and coughed. Alicia leaned back and stopped breathing. At this point, defendant believed that Alicia had "already expired," and he did nothing further to assist her.

Defendant drove to the hospital several times, but each time he lost his nerve and did not stop. He also went to several relatives' houses in Richmond and Vallejo, but he did not tell anyone what had happened. On Tuesday, he went to his home in Vallejo, where he found Veronica and Mia on the porch talking to his roommate. By that time, defendant had reclined the front, passenger seat and partially covered Alicia's body with clothes. Defendant said that he drove away after Veronica looked in the car because he "got scared."

Defendant got on the freeway and headed toward his brother's house in Richmond. When he was about four miles away from his brother's house, he crossed paths with Yvette and Daniel, who were in a van. He became aware that they were trying to get his attention when they broke the rear window of the Solara. When the van pulled up beside him, Yvette was in the passenger seat and she asked, " 'Where is my cousin?' " Defendant pointed to the passenger seat and said, " 'She's right here. Pull over.' " Defendant wanted them to get out of the street so they could talk. Defendant became scared when they did not get out of the van, he feared for his life because he thought it

was “Mario” in the van and defendant knew him to be “a really violent person.” Defendant then drove off, making a right on Richmond Parkway and continuing northbound on San Pablo Avenue. The van continued to drive beside him. After turning onto to Stanton Street, he parked the car; he got out, put his hands in the air and faced a police officer who had been following him. When defendant saw people get out of the van, he thought they had weapons. Fearing for his life, he ran away. He was eventually arrested by officer Allen, who had grabbed him, thrown him to the ground, straddled him and hit him a few times. Defendant explained that the scratches on his right cheek and nose were caused by Alicia, not the arresting officers. Defendant believed the discoloration on his cheeks occurred when Alicia hit him in his temple with what he thought was some type of hard object.

On cross-examination, defendant admitted he was convicted of the following felonies: (1) possession of methamphetamine for sale in 1992 ; (2) evading a police officer in 1993; (3) carjacking in 1999; (4) automobile theft in 1999, and (5) evading police in 1999.

Defendant admitted that he had slapped Alicia on a number of occasions. He also admitted that he hit Alicia before she got out of the car at the Vallejo Inn. He walked over to her and asked her to “come on.” He put his arms around her and walked her back to the car. Defendant admitted that he told the police that he “kind of” forced Alicia into the car. He forced her into the car because “there was a bunch of people” in the motel parking lot and he “wanted some privacy.” Defendant wanted to talk to Alicia and “she eventually realized that.” They then “drove off together.”

Defendant admitted telling the police that he had hit Alicia on 10 or more occasions. He told the police that he had “smacked” Alicia in December 2003. However, he explained that, to him, there was a difference between slapping and hitting, and he had only slapped Alicia. He admitted that on the night in question, he hit Alicia in the mouth and fractured her jaw. He also believed he was responsible for splitting the skin open under her eye and chin.

When he spoke to the police, defendant did not state that he and Alicia had fought about Ray. Rather, he told the police that he and Alicia fought because he was looking at some girls. He later told the police that they fought because he wanted to drive and Alicia did not want him to do so. He also told police that Alicia was going to leave him on the night in question. Defendant told police that she said, " 'I can't fucking stand you. And after today it's over.' " Alicia told defendant, " 'You are not going to hit me anymore,' " and then said, " 'After today it's over.' " Defendant told police that Alicia told him three times that night that she did not want to be with him anymore. Defendant denied threatening Alicia by telling her that if she ever left him, he would "pull an OJ Simpson or Scott Peterson on her."

Defendant admitted that he told the police that he had Alicia in a headlock for about a minute and a half. He told police that he grabbed her around the neck "like you hold a football," and he leaned on her, putting his body weight on her as he restrained her. When he let her go, she was gasping and it looked like she was having a hard time breathing. She then stopped breathing. However, he told police that when he let her go, she was breathing and "chilling," "everything was cool," and they "kicked it" for a few minutes. When asked about an injury to his hand, defendant told the police it was an old injury; he denied telling the police that Alicia caused it three days earlier.

Defendant told police that after Alicia died, he ran and did not stay in the area because he did not want anyone to think that there was a murderer on the loose. He told the police that he ran from the deputies because he always ran from the police. He also told them that running was " 'better than handcuffing,' " Defendant denied being combative at the time of his arrest, but admitted that the police put him in a wrap.

On redirect examination, defendant reiterated that Alicia was breathing when he released her and that she had vomited. He stated that he did not try to kill Alicia and felt it was " 'an unfortunate accident.' "

On re-cross examination, defendant explained that he lied to police when he told them he had not been drinking because he had been in a residential treatment program

and was not supposed to drink. Defendant did not think it was important to be truthful in a homicide investigation, but now realized that it "play[ed] a big part in the trial."

2. Forensic Evidence

Paul Herrmann, M.D., a forensic pathologist, reviewed the autopsy report and photographs, along with other evidence in the case, and agreed with Dr. Josselson that the cause of death was "compression of the neck by strangulation." He testified that the absence of bruising around the neck could mean that the thing compressing the neck was something large and relatively smooth, such as an arm. Dr. Herrmann, however, would not have used the term "yoking" because he did not believe the autopsy revealed what caused the strangulation. Rather, the autopsy merely established a small fracture to the larynx, which implied that there had been pressure on the neck. He explained that fractures of the larynx are painful and cause the larynx to go into spasm, which make it difficult to breathe.

Dr. Herrmann opined that squeezing the neck could occlude the jugular veins, causing the person to pass out or die if the pressure is applied long enough. If pressure was applied to the carotid arteries, a person would be expected to pass out in eight seconds and go into convulsions and die. However, if the pressure was applied toward the vagus nerve, which is along the carotid arteries, it could cause instantaneous cardiac arrest and sudden death. He opined that a person released from a headlock could still be breathing, but might not recover if they already have "[a] reduced amount of oxygen and already perhaps have some irregular heart beat." Dr. Herrmann reiterated that the cause of death was strangulation by compression of the neck, but the mechanism of death was unknown.

On cross-examination, Dr. Herrmann agreed that yoking was consistent with defendant's statement that he choked Alicia by putting his arm around her neck. He further agreed that the absence of petechial hemorrhaging and a hyoid fracture did not mean that Alicia was not strangled to death by defendant. He believed with "reasonable medical certainty" that strangulation was the cause of death. Indeed, the fractured larynx

was consistent with defendant strangling Alicia until she stopped breathing. It would take a significant amount of force to fracture the larynx.

C. Rebuttal

On July 27, 2004, during an interview at the Vallejo Police Department, defendant made numerous conflicting statements to the investigating officers about his involvement in Alicia's death. Although defendant was "somewhat calm" during the interview, it was difficult to get him to provide "a clear answer." Defendant did not cry during the interview and actually even laughed a few times.

Defendant provided two different stories about how he choked Alicia. First, he said that he grabbed her by the neck, but later said he had her head under his arm, leaving her neck exposed. He initially said he pulled up her head and then stated that he rested his weight on her head while his arm was under her neck.

Defendant also provided two different stories about the origin of the argument with Alicia at the Vallejo Inn. He first said that they argued because he looked at another woman, and later said that they fought about who would drive the car. Defendant never mentioned that the argument started over Alicia's former fiancée, Ray. Defendant also said that he got the lump on his head when he was tackled by the police. He never said he got the lump from Alicia or mentioned that she hit him over the head with a blunt object.

Defendant told the investigating officers that he thought Alicia stopped breathing because her body blew up within a half an hour. He later told them he thought she stopped breathing because she was choking on alcohol. Defendant said that he did not try to help Alicia, but later said that he did try to help her; he never explained what he did to assist her.

Defendant told the officers that he and Alicia had not been drinking. He specifically said that they were both sober. However, at another point, he mentioned that he and Alicia went to Port Costa and had a couple of drinks.

Also, defendant never mentioned asthma or an asthma pump during the interview. Officer Cheatham first heard about the "asthma theory," when he talked to the prosecutor

in August 2006. At the prosecutor's request, Cheatham went to Alicia's car and seized an asthma pump, which had been on the floor.

Suzanne Howisey, an investigator for the district attorney's office, accompanied the prosecutor when she went to speak with defendant in the summer of 2006. At that time, defendant talked about his defense theories. He said that the defense originally had "an NGI theory" that he did not like, and that the defense was proceeding with "the asthma theory."

II. DISCUSSION

A. Instructional Issues

We begin with the proper standard of review on a claim of instructional error. " ' "In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citation.]" ' [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111-1112.) The correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction, or from a particular instruction. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) Finally, it is the responsibility of the party desiring modification, clarification or expansion of a jury instruction he or she views as incomplete or ambiguous to so request. Failure to do so waives any claim of error. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1020.)

1. CALJIC No. 8.51

Defendant contends the trial court erred by giving CALJIC No. 8.51, which, in distinguishing murder and manslaughter, refers to a death occurring during the commission of a felony. Defendant contends the error was prejudicial because it permitted the jury to convict him of murder without finding he acted with malice.

Although he did not object to the instruction, defendant now argues it improperly interjected the doctrine of felony murder into the case in violation of the merger doctrine

articulated in *People v. Ireland* (1969) 70 Cal.2d 522, 539 (*Ireland*). The merger doctrine prohibits an assaultive crime from serving as the predicate felony in second degree felony-murder prosecutions; the assault merges into the homicide. (*People v. Chun* (2009) 45 Cal.4th 1172, 1178 (*Chun*).)

The jury was instructed on first and second degree murder, as well as assault with great bodily injury. The assault could not support a felony-murder instruction because of the merger doctrine, which precludes bootstrapping felonious assaults into murder. (*Chun, supra*, 45 Cal.4th at pp. 1200-1201; *Ireland, supra,* 70 Cal.2d at p. 539.) Since felony murder was not a theory in the case, the reference to murder in the commission of a felony in CALJIC No. 8.51 was not relevant and the instruction should have been modified to delete that reference. However, by failing to request such a modification, defendant waived the issue on appeal. (*People v. Jenkins, supra,* 22 Cal.4th at p. 1020.)

Even assuming the issue was not waived, the error in giving the unmodified instruction was harmless under the circumstances. This is because the instructions as a whole properly set out the elements the jury was required to find in order to convict defendant of murder. Specifically, the jury was instructed with CALJIC No. 8.30, which explained that "[m]urder of the second degree is . . . the unlawful killing of a human being with malice aforethought when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation." Pursuant to CALJIC No. 8.11, the jury was instructed that malice is implied when the killing results from an intentional act the natural consequences of which are dangerous to human life. This concept was expanded on by CALJIC No. 8.31, which instructed that second degree murder is a killing that resulted from an intentional act, the natural and probable consequences of which are dangerous to human life, and which was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

Significantly, the trial court did not instruct the jury on felony murder beyond the single sentence referenced in CALJIC No. 8.51. The trial court carefully redacted any reference to felony murder from CALJIC No. 8.10. Also, the jury was not given either CALJIC No. 8.21 [first degree felony murder] or CALJIC No. 8.32 [second degree

felony murder]. No felony was identified as an allowable predicate for felony-murder liability. And, the verdict form did not ask the jury to identify a predicate offense underlying its finding of murder.

More importantly, the prosecutor in this case never argued the felony-murder rule. Rather, the prosecution's case was based on first degree premeditated murder. In her opening statement, the prosecutor made no reference to any predicate felony; instead she said the murder charge would be based on evidence that defendant acted with premeditation and deliberation when he strangled Alicia to death. In closing, she explained that murder required malice aforethought, and she made express malice the centerpiece of her closing argument. She argued that Alicia's death was not manslaughter but was first degree murder because defendant acted with express malice when he strangled Alicia to death. She also devoted her entire rebuttal to the inconsistencies in the defense and defendant's credibility. At no point did the prosecutor mention felony murder.

In our view, a single tangential reference in one instruction to an undefined felony did not impermissibly inform the jury that it could convict defendant of murder without a finding that he acted with malice. Several courts, including our Supreme Court, have held under comparable circumstances that erroneous felony-murder instructions were not so misleading as to require reversal. For example in *People v. Barnett* (1998) 17 Cal.4th 1044, 1154 (*Barnett*), the trial court gave CALJIC No. 8.10, stating in relevant part that " 'murder is the unlawful killing of a human being with malice aforethought or unlawful killing of a human being which occurs during the commission or attempted commission of a felony inherently dangerous to human life.' " (Italics omitted.) The case, however, had not been prosecuted on a felony-murder theory. (*Ibid.*) Barnett argued that the unredacted instruction could have allowed the jury to convict him of murder based on felonies that were impermissible under the merger rule. (*Ibid.*) The Supreme Court held there was no reversible error because the other instructions clearly informed the jurors that there could be no conviction of first degree murder unless they found premeditation and deliberation. (*Ibid.*) Further, the record made it clear that the prosecutor was seeking

a conviction based upon a theory of deliberate and premeditated murder. (*Id.* at pp. 1154-1155.) Accordingly, the court concluded, "no reasonable juror could possibly have understood that guilt could be predicated upon a felony-murder theory." (*Id.* at p. 1155.)

Similarly, *People v. Cisneros* (1973) 34 Cal.App.3d 399 (*Cisneros*), disapproved on other grounds in *People v. Ray* (1975) 14 Cal.3d 20, 30, footnote 8, involved a case that had not been prosecuted on a felony-murder theory, but the instructions given nevertheless referred to a death occurring during the commission of a felony. (*Cisneros*, *supra*, at p. 432.) The defendant argued that an instruction referencing felony murder relieved the jury of the need to find malice before it returned a second degree murder conviction. (*Id.* at pp. 432-433.) Reviewing the instructions as a whole, the court found no reversible error, noting that "the references to felony second degree murder were only tangential. There was no instruction directing the jury's attention to a particular felony . . . [And], the jurors were not relieved of the necessity of making a specified finding of malice aforethought before returning a verdict of second degree murder." (*Id.* at p. 433.)

Also, in *People v. Roy* (1971) 18 Cal.App.3d 537 (*Roy*), disapproved on other grounds in *People v. Ray*, *supra*, 14 Cal.3d at page 29, the trial court instructed that malice may be implied " 'when the killing is a direct causal result of the perpetration or the attempt to perpetrate a felony inherently dangerous to human life.' " (*Roy*, *supra*, at p. 550.) The court held: "The jury could not have been misled by the instruction . . . [D]efendant was not charged with felony murder, instructions on second degree felony murder identifying the felony as assault with a deadly weapon and defining its elements were not given, and the prosecutor did not argue a theory of felony murder." (*Ibid.*)

These cases demonstrate that an irrelevant felony-murder instruction is not reversible error if the instructions as a whole and the conduct of the prosecutor show the jury could not have been misled into convicting on a felony-murder theory. The jury was correctly instructed on the elements of murder, including express and implied malice, and the prosecution never argued felony murder.

Suniga v. Bunnell (9th Cir. 1993) 998 F.2d 664 (*Suniga*), upon which defendant relies, is distinguishable. In *Suniga*, the trial court gave a version of CALJIC No. 8.10

that offered felony murder as an alternative theory to implied malice, and specifically defined assault with a deadly weapon as a predicate felony that could support felony murder. (*Id*. at p. 666.) Because assault with a deadly weapon could not support felony murder, this was reversible error. (*Id.* at p. 667.) Thus, in *Suniga*, the jury could have reasonably believed that felony murder offered an alternative way to reach a murder verdict, without the need to find malice. Here, in contrast, the trial court's definitions of murder and the prosecutor's arguments to the jury emphasized that malice was an essential prerequisite to a murder verdict. In other words, "no reasonable juror could possibly have understood that guilt could be predicated upon a felony-murder theory." (*Barnett*, *supra*, 17 Cal.4th at p. 1155.)

For all of the foregoing reasons, we conclude that the erroneous, stray reference to felony murder in the instructions was harmless beyond a reasonable doubt. (*Chun*, *supra*, 45 Cal.4th at p. 1201.)

2. Voluntary Manslaughter

Defendant contends that his conviction for second degree murder must be reversed because the court defined the lesser included offense of voluntary manslaughter as requiring an intent to kill. We agree the instruction misstated the law, but conclude it was not prejudicial.

In California, criminal homicide is divided into two classes: murder and manslaughter. (*People v. Rios* (2000) 23 Cal.4th 450, 460.) The distinguishing feature is that murder includes the element of malice, while manslaughter does not. (*Ibid.*) Malice may be express or implied; it is *express* when the perpetrator manifests a deliberate intention to unlawfully take away the life of another and is *implied* "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (§ 188.)

It has long been the rule in this state that an intentional killing which would otherwise be an express malice murder will be "reduced" to voluntary manslaughter when it is the product of adequate provocation and heat of passion. (*People v. Rios*, *supra*, 23 Cal.4th at pp. 460-461.) In *People v. Lasko* (2000) 23 Cal.4th 101 (*Lasko*), our

Supreme Court held that this rule of mitigation also applies to *implied* malice murder, so that a defendant who kills with a "conscious disregard for life" as a result of provocation is guilty of voluntary manslaughter rather than second degree murder. (*Id.* at pp. 104, 108-110; see also *People v. Blakely* (2000) 23 Cal.4th 82, 85.)

Before *Lasko*, numerous decisions had stated in dicta that intent to kill was an essential element of voluntary manslaughter. (See *Lasko, supra*, 23 Cal.4th at p. 110.) That principle was incorporated in the version of CALJIC No. 8.40 that was given in this case. By defining voluntary manslaughter to require an intent to kill, CALJIC No. 8.40 erroneously suggested that implied malice murder could not be reduced to voluntary manslaughter by provocation and heat of passion. (See *ibid.*) Nevertheless, in *Lasko,* our Supreme Court found the erroneous instruction harmless under the state law standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 based on two factors. (*Id.* at pp. 111-112.)

First, the jury had also been given CALJIC No. 8.50, which correctly informed the jury that in order to convict defendant of murder and not manslaughter the People must prove that the act which caused the death was not done in the heat of passion or upon a sudden quarrel. (*Lasko*, *supra*, 23 Cal.4th at pp. 111-112.) The court reasoned that if the jury believed defendant had "unintentionally killed [the victim] in the heat of passion, it would have concluded that it could not convict defendant of murder (because he killed in the heat of passion) and could not convict defendant of voluntary manslaughter (because he lacked the intent to kill). The jury most likely would have convicted defendant of involuntary manslaughter, a lesser offense included within the crime of murder, on which the jury was also instructed. Instead, the jury convicted defendant of second degree murder, showing that it did not believe the killing was committed in the heat of passion." (*Id.* at p. 112.) Second, the subject of voluntary manslaughter had not figured prominently in closing arguments and the evidence strongly suggested an intent to kill. (*Ibid.*) Therefore, "[u]nder the circumstances, it is not reasonably probable that a properly instructed jury would have convicted defendant of the lesser [included] offense of voluntary manslaughter. [Citation.]" (*Id.* at p. 113.)

The court also rejected Lasko's assertion that the erroneous instruction had violated his federal constitutional rights to trial by jury and to due process of law. (*Lasko*, s*upra*, 23 Cal.4th at p. 113.) It explained that when the jury charge is considered as a whole, it does not support the position that the erroneous instruction "could have led the jury to conclude that if he lacked an intent to kill, it had to find him guilty of the more serious crime of murder." (*Ibid.*)

The People do not dispute that *Lasko* is controlling, and do not attempt to defend the former version of CALJIC No. 8.40 as an accurate statement of the law. Instead, they focus on the effect of the instruction, correctly observing that reversal is required only if it is reasonably probable that the defendant would have obtained a more favorable outcome absent the error. (*Lasko*, *supra*, 23 Cal.4th at pp. 111-113.)[3]

In assessing prejudice, we first consider whether the defect in CALJIC No. 8.40 was cured by other instructions advising the jury that an implied malice killing is manslaughter when accompanied by adequate provocation. The *Lasko* decision noted that CALJIC No. 8.50, which also was given in the instant case, reduces the likelihood that a defendant will be convicted of second degree murder if the jury determines that he killed unintentionally and in the heat of passion. (*Lasko*, *supra*, 23 Cal.4th at pp. 111-112.) That instruction provides, "To establish that a killing is murder . . . and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the heat of passion or upon a sudden quarrel . . . ." (CALJIC No. 8.50.)

CALJIC No. 8.50 usually would be sufficient to apprise the jury that adequate provocation negates implied as well as express malice. This is especially so when, as here, the jury is instructed on involuntary manslaughter and has the option of returning a

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[3] As *Lasko* concluded that this type of instructional error does not implicate a defendant's federal constitutional rights (*Lasko*, *supra*, 23 Cal.4th at p. 113), we reject defendant's claim that its effect must be evaluated under the "harmless beyond a reasonable doubt" standard of *Chapman v. California* (1967) 386 U.S. 18, 24.

verdict on that lesser offense if it determines the killing is both provoked and unintentional. (See *Lasko, supra,* 23 Cal.4th at pp. 111-112.)

Granting that the jury might not have necessarily understood from the instructions that implied malice murder can be reduced to manslaughter by adequate provocation alone, other circumstances convince us the error was harmless. Most significant is the virtual absence of evidence that defendant was provoked to commit the killing.

Several witnesses testified that Alicia was bleeding and that she attempted to get police assistance before defendant brought her back to the car. No one saw Alicia hit defendant or otherwise act like the aggressor. After defendant "peeled" out of the parking lot, he drove to a secluded spot where the killing occurred.

Though defendant testified that when he and Alicia were in the car, she hit him in the head with a blunt object, the record belies this claim. When defendant initially spoke with the police, he did not mention that Alicia had hit him over the head with a blunt object. Indeed, he told the police that he got the bump on his head when he was tackled by the officers at the time of his arrest. Also, there was no blood spatter on the driver's side of the car, which would indicate that defendant did not sustain a blunt force injury.

The provocation necessary to reduce a murder to manslaughter must be caused by the victim and must be sufficient to cause an ordinary person of average disposition to act rashly or without due deliberation or reflection. (*People v. Ochoa* (1998) 19 Cal.4th 353, 422-423; *People v. Lujan* (2001) 92 Cal.App.4th 1389, 1411-1412.) The instruction on voluntary manslaughter and provocation was supported by the evidence, but the evidence supporting that theory was weak compared to that supporting the judgment of second degree murder. There is no reasonable probability the instructional error complained of affected the result. (See *People v. Breverman* (1998) 19 Cal.4th 142, 177-178.)

Defendant claims that the erroneous instruction could have led the jury to conclude that once it acquitted him of first degree murder, "the only choice for [the] jury was to convict [him] of second degree murder on an implied malice theory, regardless of its assessment of the provocation that precipitated the strangling." According to defendant, the jury was left with "an unwarranted choice between a second degree

murder verdict and outright acquittal . . . ." We disagree. The court's misapplication of *Lasko* could not have affected the verdict in the manner that defendant suggests. Here, as in *Lasko*, the jury was given CALJIC No. 8.50 and, thus, knew it could not convict defendant of murder unless it found that the People had satisfied their burden of proving beyond a reasonable doubt that the death did not occur in the heat of passion or upon a sudden quarrel. Thus, just as in *Lasko*, if the jury believed defendant had acted in the heat of passion without an intent to kill, it "most likely would have convicted [him] of involuntary manslaughter, a lesser offense included within the crime of murder, on which the jury was also instructed. Instead, the jury convicted defendant of second degree murder, showing that it did not believe the killing was committed in the heat of passion." (*Lasko*, *supra*, 23 Cal.4th at p. 112.)

Finally, neither side strongly argued for a voluntary manslaughter conviction. During closing arguments, the prosecutor only briefly mentioned voluntary manslaughter. Instead, the People focused on premeditated first degree murder and the malice requirement for first and second degree. The defense theory (that this was all just an unfortunate accident) was inconsistent with all verdicts, except an acquittal or involuntary manslaughter. Notably, "neither the prosecution nor the defense suggested that defendant was guilty of murder if he intentionally killed [Alicia] in a sudden quarrel or the heat of passion." (*Lasko*, *supra*, 23 Cal.4th at p. 112.) For all these reasons, we find the erroneous instruction to be harmless under state law and also conclude that it did not result in infringement of defendant's constitutional guarantees. (*Id.* at pp. 111-113.)

3. Unanimity

Defendant argues that the trial court prejudicially erred in failing to instruct the jury on the requirement of unanimity with regard to the assault charge in count two. Defendant claims there was evidence of "two distinct factual theories . . . on which the jury could rely to convict [him] of assault by means likely to produce great bodily injury—the "backhanding" incident at the Vallejo Inn where defendant "automatically reacted to Alicia's blow[,]" and the "headlock" incident in front of Brook's house where he "intentionally grabbed Alicia" to prevent her from hitting him.

"In a criminal case, a jury verdict must be unanimous. [Citations.] . . . Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) "This requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' [Citation.]" (*Ibid.*)

However, "no unanimity instruction is required where the [arguably separate] acts proved constitute a continuous course of conduct. [Citation.]" (*People v. Napoles* (2002) 104 Cal.App.4th 108, 115.) "The unanimity instruction is not required when the acts alleged are so closely connected as to form part of one transaction. [Citations.] The 'continuous conduct' rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them. [Citation.]" (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.) "The continuous course of conduct exception arises in two contexts. [Citations.] 'The first is when the acts are so closely connected that they form part of one and the same transaction, and thus one offense. [Citation.] The second is when . . . the statute contemplates a continuous course of conduct of a series of acts over a period of time. [Citation.]' [Citation.]" (*People v. Jenkins* (1994) 29 Cal.App.4th 287, 299.) Regarding the first type of continuous course of conduct,[4] "when the acts are so closely connected in time as to form part of one transaction," no unanimity instruction is required. (*People v. Crandell* (1988) 46 Cal.3d 833, 875, overruled on another ground in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.)

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[4] The latter category of the continuous course of conduct exception applies to crimes that cover repetitive or continuous conduct. (See, e.g, *People v. Moore* (1986) 185 Cal.App.3d 1005, 1015 [child abuse]; *People v. Thompson* (1984) 160 Cal.App.3d 220, 225 [spousal battering].)

Here, even though assaults were arguably separated in time and place, we, nevertheless, conclude the various acts alleged by the prosecutor were sufficiently connected in time as to form part of one transaction and thus one offense. Based on the record, it can only be reasonably inferred that the entire incident between defendant and Alicia lasted, at most, an hour. A number of cases have held that if a defendant's acts occur within a short period of time, those acts are so closely connected as to form only one transaction and thus one offense. (See *People v. Curry* (2007) 158 Cal.App.4th 766, 782-783; *People v. Percelle* (2005) 126 Cal.App.4th 164, 182 [acts separated by one hour]; *People v. Haynes* (1998) 61 Cal.App.4th 1282, 1296 [acts "were just minutes and blocks apart and involved the same property"]; *People v. Mota* (1981) 115 Cal.App.3d 227, 233 [acts committed over course of one hour]; *People v. Epps* (1981) 122 Cal.App.3d 691, 702 ["[s]eparate acts may also result in but one crime if they occur within a relatively short time span"].) Moreover, because defendant "offer[ed] essentially the same defense to each of the acts [i.e., he acted in self-defense], and there [was] no reasonable basis for the jury to distinguish between them [citation]" (*People v. Stankewitz, supra*, 51 Cal.3d at p. 100), we conclude the trial court did not err by not instructing on unanimity regarding the assault charge.

Even assuming the trial court erred by not so instructing, we would nevertheless conclude the error was harmless beyond a reasonable doubt under *Chapman*. In this case, the record provided no basis for the jury to distinguish between the various acts such that the jury must have believed defendant committed all of those acts, if he committed any of them. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199.) Because on this record the jury resolved the basic credibility dispute against defendant and would have convicted him of any of the various assaults shown by the evidence, the failure to give the unanimity instruction was harmless beyond a reasonable doubt. (*People v. Jones* (1990) 51 Cal.3d 294, 307; *People v. Thompson* (1995) 36 Cal.App.4th 843, 852-853.)

B. Evidentiary Issues

1. Testimony that Defendant had Threatened to Kill Alicia

Defendant contends the prosecution, in its argument to the jury, misrepresented the import of the testimony that defendant had threatened to kill Alicia. Defendant argues the evidence was admitted, over his hearsay objection, for the limited purpose of establishing Alicia's state of mind, yet the prosecutor argued the evidence for the truth of the matters asserted. Defendant claims his trial counsel rendered ineffective assistance by failing to object to the argument or request a limiting instruction.

a. Background

Veronica testified that, about a week before Alicia went missing, she told Veronica that defendant told her that he "was going to do a Lacy [*sic*] Peterson on her and none of her family would be able to find her." According to Veronica, Alicia said she was afraid. On cross-examinations, Veronica acknowledged that Alicia's actions, i.e., going to motels with defendant, were inconsistent with Alicia's statement that she was afraid. Also, during cross-examination by the prosecutor, defendant denied that he ever threatened Alicia.

During closing argument, the prosecutor argued that express malice had been shown "both by words and conduct in this case." Specifically, the prosecutor argued: "You know in this case he made a threat. Then he followed through with it. [¶] The words, the threat, express[] malice. The conduct that we saw is also express[] malice." Also, when discussing premeditation, the prosecutor referred to the incident in Vallejo Inn parking lot. The prosecutor noted that defendant grabbed Alicia and then dragged her back to the car. This conduct, the prosecutor argued, demonstrated that defendant was a "violent, controlling human being," and he "wasn't going to let her leave." The prosecutor continued: "You also notice what he said. We talked about that earlier. You know, 'You leave me, I'm going to pull an OJ Simpson or Scott Peterson on you.' We all know what that means. It means he was going to kill her. It means I'm going to kill you. That's what that means. That's how she took it. She was afraid. And we know that's exactly what he did."

b. Analysis

As the People concede, the prosecutor was wrong to rely on the threats as evidence to prove that defendant threatened Alicia and, inferentially, carried out those threats. Nevertheless, a prosecutor's misuse of evidence admitted for a limited purpose does not necessarily warrant reversal. (*People v. Ortiz* (1995) 38 Cal.App.4th 377, 396.) For example, in *Ortiz*, the prosecutor made a brief comment during closing argument suggesting the truth of the content of a statement made by the victim and admitted only to show the victim's state of mind. (*Id.* at pp. 395-396.) Although the comments challenged here are longer, they are still relatively brief in the context of a lengthy argument. The comments did not constitute " 'deceptive or reprehensible methods to persuade the jury' " and certainly did not infect the trial with " 'such " 'unfairness as to make the resulting conviction a denial of due process.' " [Citations.] . . .' [Citation.]" (*People v. Parson* (2008) 44 Cal.4th at 332, 359.)

Moreover, even without the threat statement, there was more than ample evidence that defendant acted with malice when he killed Alicia. By his own testimony, defendant described to the police how he grabbed Alicia around the neck, lifted her up, and pushed his weight on her. Defendant also admitted that he choked Alicia for at least a minute and a half. Moreover, Dr. Herrmann, defendant's own expert, concurred in the cause of death as being strangulation. Although Dr. Herrmann explained that compression of the vagus nerve could cause instant death, he did not testify that this type of compression occurred in the instant case. Rather, he maintained that the cause of death was strangulation by compression of the neck, but the exact mechanism of death was unknown. Dr. Herrmann noted that Alicia had a fractured larynx, which required a great deal of force. Indeed, Dr. Herrmann testified that the fractured larynx was consistent with defendant strangling Alicia until she stopped breathing.

In light of the overwhelming evidence supporting the theory that defendant acted with malice at the time he strangled Alicia, even without reference to the threat, there is no reasonable probability that the trial outcome would have been different if defense

counsel had objected during the prosecutor's argument and obtained a limiting instruction. Accordingly, defendant's claim of ineffective assistance of counsel fails.

2. Testimony that Defendant Had Once Put his Stepfather in a Coma

Over defense objection, the trial court failed to strike the testimony that defendant had once put his stepfather in a coma. Defendant claims that this stray remark constituted a prior crime that "skew[ed]" the jury's ability to determine whether he acted with implied malice in the charged offense. We disagree.

Evidence Code section 1101, subdivision (a) prohibits the admission of other-crimes evidence for the purpose of showing a defendant's bad character or criminal propensity. (*People v. Catlin* (2001) 26 Cal.4th 81, 145.) Subdivision (b) permits the use of other-crimes evidence "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act."

When evidence of another crime is admitted on the issue of intent, the other crime must be sufficiently similar to the charged offense to support the inference that the defendant probably harbored the same intent in each instance. (*People v. Kipp* (1998) 18 Cal.4th 349, 371.) Even when relevant, such evidence must be excluded under Evidence Code section 352 if its prejudicial effect outweighs its probative value and creates "a serious danger of undue prejudice, of confusing the issues, or of misleading the jury. [Citation.]" (*Kipp, supra*, at p. 371.) A trial court's rulings under Evidence Code sections 1101 and 352 are reviewed for abuse of discretion. (*Ibid.*)

Here, the reference to defendant putting his father in a coma was of little probative value in this case. That said, this stray remark was not mentioned again during the trial. Thus, there was no undue consumption of time or danger of undue prejudice, confusion of the issues, or of misleading the jury.

Even assuming the court should have excluded this evidence under Evidence Code section 352, any such error was harmless since it is not reasonably probable defendant would have obtained a more favorable result absent this evidence. (*People v. Felix* (1993) 14 Cal.App.4th 997, 1007-1008.) "The prejudicial effect inherent in evidence of

prior offenses varies with the circumstances of each case. Factors that affect the potential for prejudice include the degree to which the prior offense is similar to the charged offense, how recently the prior conviction occurred, and the relative seriousness or inflammatory nature of the prior conviction as compared with the charged offense. [Citation.]" (*People v. Wade* (1996) 48 Cal.App.4th 460, 469 [discussing prejudicial effect of evidence concerning the nature of a prior conviction that is an element of the charged offense].) " ' "Improper evidence of [a] prior offense results in reversal *only* where the appellate court's review of the trial record reveals a closely balanced state of the evidence. [Citations.]" ' [Citation.]" (*In re James B.* (2003) 109 Cal.App.4th 862, 875.)

These factors militate against a showing of prejudice in this case. The evidence of defendant's guilt was very strong rather than "closely balanced." (*In re James B., supra*, 109 Cal.App.4th at p. 875.) Other than the isolated remark made by Alicia's mother, there was no evidence whatsoever about when the alleged incident occurred or how it occurred. Against this backdrop, the single remark was unlikely to have affected the verdict. Moreover, the alleged incident was no more inflammatory—and arguably less inflammatory—than the charged offense. Accordingly, reversal is not required.

McKinnney v. Rees (9th Cir. 1993) 993 F.2d 1378 (*McKinney*), upon which defendant relies, does not compel a contrary conclusion. In *McKinney*, a murder conviction was reversed due to the admission of extensive negative character evidence demonstrating the defendant's prior involvement and fascination with knives, the murder weapon at issue. (*Id.* at p. 1384) The court found this evidence irrelevant to any fact of consequence; it only showed propensity. (*Id.* at pp. 1382-1383.)

McKinney is distinguishable. Here, evidence of the alleged coma-inducing incident, though irrelevant, was fleeting. It constituted a single remark, not 60 pages of testimony as in *McKinney*. (*McKinney*, *supra*, 993 F.2d at p. 1386.) This single reference was clearly far less prejudicial than the extensive knife evidence presented in *McKinney*.

We conclude that even if the trial court erred in not striking the testimony that defendant had once put his stepfather in a coma, it was harmless beyond a reasonable doubt.

C. Security Issue

Defendant contends the trial court erred in allowing a bailiff to "hover" near him while he was on the witness stand testifying.[5] We disagree.

1. Background

During trial, defendant was restrained by leg shackles at counsel's table, which were not visible to the jury. When defendant entered and exited the courtroom, he did so outside the presence of the jury. Defense counsel conceded that the arrangements were adequate and that defendant's leg shackles were hidden from view by defendant's clothing. However, defense counsel objected when a bailiff requested to "stand near [defendant] over in the corner" while defendant testified. In response, the trial court stated that the bailiff would be "able to stand out of the way in an inconspicuous spot over there." Defense counsel argued that this security measure conveyed that defendant was a dangerous person.

Rejecting this argument, the trial court ruled: "I have before me a person, I heard evidence that the District Attorney has presented, the evidence he resisted the police. I know he was convicted of carjacking when he was escaping from the police [in a prior case]. I know that he has stated to one correctional officer, 'Has anyone escaped from the holding area?' [¶] So, for those reasons I think he's a flight risk. The shackles on his knee will continue to be there. [¶] [The bailiff] will assume a position that is needed in this case."

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[5] The California Supreme Court has recently affirmed a decision by another panel of this division, which addresses a similar issue. (See *People v. Stevens* (2009) 47 Cal.4th 625.) The court has also granted review in a similar case by our colleagues in Division Two of this appellate district. (See *People v. Hernandez* (2009) 175 Cal.App.4th 940, review granted Sept. 10. 2009, S175615.)

2. Analysis

A trial court has broad power to maintain an orderly and secure courtroom. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1269 (*Hayes*). Its decision regarding courtroom security measures is reviewed under an abuse of discretion standard. (*People v. Ayala* (2000) 23 Cal.4th 225, 253.)

The issue of whether security measures are so prejudicial so as to deny a defendant the right to a fair trial must be determined on a case-by-case basis. (*Hayes, supra*, 21 Cal.4th at p. 1269.) A court must determine whether the security practices presented an " 'unacceptable risk' " that impermissible factors will come into play. (*Ibid.*, quoting *Holbrook v. Flynn* (1986) 475 U.S. 560, 570 [*Holbrook*]).) A court should look " 'at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over.'. . ." (*Ibid.*, quoting *Holbrook*, *supra*, at p. 572.) " 'The chief feature that distinguishes the use of identifiable security officers from courtroom practices we might find inherently prejudicial is the wider range of inferences that a juror might reasonably draw from the officers' presence. While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards. . . . Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm.'. . ." (*Ibid.*, quoting *Holbrook*, *supra*, at p. 569.)

Here, defendant contends that the trial court's decision to allow a bailiff "to hover near [him] while he testified violated his [] Fifth, Sixth and Fourteenth Amendment rights

to fair trial by jury." According to defendant, the procedure used by the trial court undermined the presumption of innocence and, thus, deprived him of his due process right to proof beyond a reasonable doubt.

In *People v. Marks* (2003) 31 Cal.4th 197 (*Marks*), our Supreme Court rejected a similar contention where a security guard was seated next to the defendant while he testified. (*Id.* at pp. 222-224.) *Marks* explained that the "manifest need standard," imposed by *People v. Duran* (1976) 16 Cal.3d 282 for the use of physical restraints, does not apply to the usual deployment of guards in the courtroom, or even to their presence sitting behind the defendant. (*Marks, supra*, 31 Cal.4th at pp. 223-224.) Indeed, there is a distinction between shackling the defendant and monitoring of the courtroom by security personnel. Monitoring does not necessarily create the prejudice occasioned by physical restraints; it does not tend to dispel the presumption of innocence or to confuse and embarrass the defendant. (*Ibid.*; *People v. Jenkins*, *supra*, 22 Cal.4th at pp. 995-996.)

In the instant case, we are not convinced that the placement of a single bailiff in the courtroom was so inherently prejudicial that it impermissibly affected defendant's right to a fair trial. While the record is not detailed as to exactly how security was deployed, we know only that defense counsel complained about the bailiff's request to stand "over in the corner" while defendant testified. Therefore, contrary to defendant's assertion on appeal, the trial court did not allow the bailiff to "hover" near defendant while he was on the witness stand. Rather, the court authorized the bailiff to "stand near [defendant] over in the corner," and to stand "out of the way in an inconspicuous spot *over there*." (Italics added.)

The trial court was fully justified in deploying courtroom security this fashion, under the circumstances of the instant case. The trial court was faced with an in-custody defendant on trial for a violent crime, who had a prior history of resisting arrest and fleeing from police. The judge was also aware that defendant had inquired about the viability of escaping from the holding area. Under these circumstances, there was no prejudicial abuse of discretion in allowing a bailiff to be present somewhere near defendant during his testimony.

Defendant also complains that the trial court never advised the jury to disregard the bailiff. While an instruction advising the jury not to draw any conclusions from the placement of the bailiff during defendant's testimony would have been helpful, the failure to so admonish does not rise to prejudicial error in the instant case.

D. Other Issues

1. Alleged Misstatement of Law on Heat of Passion

Defendant argues that he received inadequate representation because his trial counsel failed to object when the prosecutor "committed misconduct in closing argument by misstating the law on heat of passion." Defendant claims the prosecutor "committed misconduct by telling the jury it could not convict [him] of voluntary manslaughter on a heat of passion theory unless it found that the provocation would move a reasonable person to kill."

The jury was instructed with CALJIC No. 8.42, which correctly set forth the circumstances that will reduce murder to manslaughter. As given, CALJIC No. 8.42 provides, in relevant part: "To reduce an unlawful killing from murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of the character and degree as naturally would excite and arouse the passion, and the assailant must act under the influence of that sudden quarrel or heat of passion. [¶] The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. . . . [¶] The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from passion rather than from judgment."

As our Supreme Court explained in *People v. Steele* (2002) 27 Cal.4th 1230, "[t]he heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively. As we explained long ago in interpreting the same language of

section 192, 'this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,' because 'no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man. [Citation.]' " (27 Cal.4th at pp. 1252-1253.)

Also in *People v. Lee* (1999) 20 Cal.4th 47, the court noted that, "[a]lthough section 192, subdivision (a), refers to 'sudden quarrel or heat of passion,' the factor which distinguishes the 'heat of passion' form of voluntary manslaughter from murder is provocation. The provocation which incites the defendant to *homicidal conduct* in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations.] The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.]" (*Id.* at p. 59, italics added.)

Here, although the prosecutor characterized the requisite provocation as moving a reasonable person to kill, her overall description of voluntary manslaughter appears to be accurate to the extent she focused on the objective circumstances that would cause a reasonable person to act rashly. Nevertheless, even if the prosecutor's description was inaccurate, defendant was not denied effective representation by his counsel's failure to object to the so-called misconduct. The alleged provocative conduct by Alicia was slight at best and was not sufficient to reduce the offense to manslaughter under any description. Moreover, the trial court properly instructed the jury on the law of heat of passion and admonished the jury that it must follow the court's instructions in the event that the arguments of counsel conflicted with the law as instructed. Absent any indication to the contrary, it must be presumed the jury followed the trial court's instructions and not the prosecutor's argument. (*People v. Boyette* (2002) 29 Cal.4th 381, 436; *People v. Najera* (2006) 138 Cal.App.4th 212, 224.)

We conclude that the prosecutor's description of the law of heat of passion, albeit even if somewhat inaccurate, did not constitute misconduct. Thus, the failure of defendant's trial counsel to object to this description did not result in ineffective assistance.

2. Failure to Hold Evidentiary Hearing Regarding Prior Conviction

Defendant contends that the trial court erred in failing to conduct an evidentiary hearing with respect to his 1999 carjacking conviction, which he claims resulted from an unconstitutional conviction. He contends his prior conviction was invalid because he suffered from a cognitive disability that "effectively precluded him from understanding the nature of his plea." We review a trial court's ruling on a motion to strike a prior conviction for abuse of discretion. (*People v. Williams* (1998) 17 Cal.4th 148, 152.)

"[A] trial court, when sentencing a criminal defendant, may not rely on a prior felony conviction obtained in violation of the defendant's constitutional rights." (*People v. Allen* (1999) 21 Cal.4th 424, 429.) A defendant seeking to plead guilty is denied due process unless the plea is voluntary and knowing. (*People v. Mosby* (2004) 33 Cal.4th 353, 359.) Under *Boykin v. Alabama* (1969) 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122, a knowing and voluntary waiver requires that the privilege against self-incrimination, the right to confront one's accusers, and the right to a jury trial " 'must be specifically and expressly enumerated for the benefit of and waived by the accused prior to acceptance of his guilty plea. [Citation.]' " (*Mosby*, *supra*, at p. 359, italics omitted.)

"The procedure for collaterally attacking a prior conviction on *Boykin/Tahl* grounds is explained in several Supreme Court cases including *People v. Sumstine* [(1984)] 36 Cal.3d [909] . . . . When a defendant seeks to collaterally attack the validity of a prior conviction, he or she must first allege facts sufficient to justify a hearing on the motion to strike the prior. That is, defendant must 'allege actual denial of his constitutional rights,' [citation] and, at least in cases involving an imperfect advisement of rights, allege that absent this denial defendant would not have pled guilty to the charge. [Citation.]" (*People v. Soto* (1996) 46 Cal.App.4th 1596, 1605-1606.) "When a defendant makes sufficient allegations that his conviction, by plea, in the prior felony

proceedings was obtained in violation of his constitutional *Boykin-Tahl* rights, the trial court must hold an evidentiary hearing. At the hearing, the prosecution bears the initial burden of producing evidence that the defendant did indeed suffer the conviction. The defendant must then produce evidence to demonstrate his *Boykin-Tahl* rights were infringed. The prosecution then has the right to rebuttal, at which point reliance on a silent record will not be sufficient. [Citations.] . . . [As this is a collateral attack on the conviction], the People need only make 'a prima facie showing of the existence of the prior conviction' [citation], whereupon the burden shifts to the defendant, who bears the burden of proving the constitutional invalidity of the conviction [citation]. In order to rely on the prior conviction in sentencing, of course, the People retain the burden of proving, beyond a reasonable doubt, that the defendant suffered the conviction. [Citation.]" (*People v. Allen, supra,* 21 Cal.4th at pp. 435-436, fn. & italics omitted.)

The fact of defendant's 1999 conviction is not in doubt. However, defendant maintains that his allegations were sufficient to have required the court to conduct an evidentiary hearing to determine whether the conviction was obtained without satisfying constitutional requirements. In his motion to strike the prior conviction, defendant claimed that his "mental health . . . rendered his plea and waiver not knowingly and intelligently made." Although defendant provided no supporting declarations, he attached the transcripts from his plea hearings, as well as a report from Katherine Powell, Ph.D., a forensic/clinical psychologist with the Solano County Health and Social Services Department, which was created four days before defendant entered his plea. Dr. Powell reported that defendant had "a long and unrelenting history of severe substance usage." She described defendant as appearing "confused," with slow and impaired "cognitive" functions. She opined that defendant "often seem[ed] to have great difficulty comprehending language," and possibly had "some thought blocking." Dr. Powell was unclear whether defendant's cognitive deficits in "executive functions" was "due to pre-morbid problems existing since childhood, head trauma, or organic impairment secondary to substance usage—or all of the above." Dr. Powell also noted that defendant's "attention and concentration [were] greatly disrupted." Dr. Powell did not conduct

further psychological testing because defendant was not a candidate for an outpatient program. She suggested that an "independent evaluation" would be useful to further "address [the issue of an] organic impairment." Dr. Powell concluded that defendant "appear[ed] to have a mixed personality disorder with Borderline, Dependent and Anti-Social features."

In his motion to strike the 1999 conviction, defendant also claimed that he did not knowingly and intelligently waive his right to confront the victim of the carjacking because at the time of the plea he did not know the elements of section 215, which required that a car be taken from the immediate presence of the victim by force or fear. According to defendant, at the time of the prior offense, he "was in flight from the police, saw a car running, jumped in and drove off." He further explained that the "victim was not in her car but had left it unattended while it warmed up."

These assertions were not sufficient to require an evidentiary hearing. The record establishes that defendant signed a written waiver of his constitutional rights. Defendant admitted that he went over the form with his attorney and that he "pretty much" understood his rights and that he asked his attorney questions about things he did not understand and counsel answered his questions. Furthermore, at the change-of-plea hearing, defense counsel averred: "I explained to him he had the right to have a jury trial. At the jury trial he would have the right to have witnesses present . . . and question and cross-examine them. I asked [him] if he understood that right to have witnesses and cross-examine witnesses, and he said he understood that right. [¶] I explained to him he wouldn't be forced to testify. Otherwise, he could testify if he decided he wanted to. He said he understood. [¶] I explained to him the maximum punishment he could receive would be thirteen years. We have gone over at great length the plea agreement and here more [*sic*]. And he's initialed that he understands that he's on parole, that this would go on his report. That he's not now under the influence of drugs or alcohol, hasn't been threatened in order to enter this plea." Defense counsel then asked defendant, "Is this all correct, Mr. Afamasaga, is that what we went over?", and defendant replied, "Yes."

Even assuming arguendo that Dr. Powell's report was admissible evidence, it does nothing more than establish that defendant suffered from various cognitive impairments and personality disorders. It is insufficient to establish that defendant lacked the capacity to knowingly and voluntarily waive his constitutional rights. Moreover, the report is insufficient to establish that the record is erroneous. (*People v. Cooper* (1992) 7 Cal.App.4th 593, 597 ["[T]he evidence presented by the minute order of a silent record and defendant's bare declaration of nonwaiver of his right to a jury trial are insufficient to support defendant's challenge of the prior conviction . . . . Defendant has not explained the circumstances surrounding the entry of his guilty plea but has presented only the conclusory allegation that he did not waive his right to a jury trial. 'Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief . . . .' "]; *People v. Sumstine, supra,* 36 Cal.3d at p. 924.)

Furthermore, defendant has not alleged that he would not have entered his plea to the earlier conviction had he been advised of his rights. In order to collaterally attack the conviction, as he seeks to do, he must allege both that he was unaware of his constitutional rights and "that he would not have pled guilty had he known of the right[s]." (*People v. Cooper*, *supra*, 7 Cal.App.4th at p. 601; *People v. Soto*, *supra*, 46 Cal.App.4th at pp. 1605-1607.) Defendant does not address this omission in either his opening brief or, despite the attention directed to the issue in the respondent's brief, in his reply.

Defendant has asserted little more than conclusory allegations bearing on his thought process and his personality disorder existing at the time of his 1999 conviction. His showing was inadequate to require an evidentiary hearing and the trial court did not err in denying the motion to strike.

E. Sentencing Issues

1. Section 654[6]

Defendant contends that because his assault conviction could have been based on the same acts as his conviction of second degree murder, his sentence on the assault count should have been stayed under section 654.

An act that is punishable by different provisions of law must be punished under the provision providing for the longest potential term of imprisonment. (§ 654, subd. (a).) However, in no case may a single act be punished under more than one provision. (*Ibid.*) "Section 654 is intended to ensure that punishment is commensurate with a defendant's criminal culpability. [Citations.]" (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 196.) It prohibits separate punishment for multiple acts that violate different statutes where those acts comprise an indivisible course of conduct incident to a single criminal objective and intent. (*Ibid.*; see *Neal v. State of California* (1960) 55 Cal.2d 11, 19.) However, when a perpetrator entertains multiple criminal objectives that are independent of, and not merely incidental to, each other, he or she may be punished for independent violations committed in pursuit of each objective, *even if those violations share common acts or are parts of an otherwise indivisible course of conduct*. (*People v. Beamon* (1973) 8 Cal.3d 625, 639; see *People v. Ramirez* (1979) 93 Cal.App.3d 714, 728.) If each act is volitional and calculated, separated by periods of time during which reflection is possible, section 654 does not prohibit punishment of each act because each act evinces a separate intent to do violence. (See *People v. Akins* (1997) 56 Cal.App.4th 331, 338-339.)

"Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable

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[6] After the instant case was fully briefed, defendant raised the section 654 issue in a supplemental letter brief.

to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

Here, the trial court found the factual predicate for assault by means likely to produce great bodily injury was defendant's conduct at the Vallejo Inn. It found defendant's infliction of injuries at the Vallejo Inn was a "separate crime not connected to [the second degree murder]." We conclude that the evidence supports the trial court's finding of discrete violent acts committed by defendant with separate objectives, albeit as a part of an otherwise indivisible course of conduct.[7] The theory offered by the prosecution was that defendant acted with two distinct mental states associated with the two offenses committed upon Alicia during the continuous attack: first, to hit Alicia and force her back to the car and continue the assault upon her, but without any intent to kill; and second, after he had driven Alicia to an isolated location, to strangle her with express or implied malice. Defendant's lack of intent to kill Alicia at the Vallejo Inn is illustrated by the fact that he did not strangle her there, but rather just assaulted her. Once defendant and Alicia arrived at Brook's house, he had the opportunity to abandon the assault. Instead, he continued to assault her and proceeded to stop her from fighting back by putting her in a deadly headlock. Finally, the injuries inflicted upon Alicia by the assaultive acts are separate from the strangulation. Thus, the trial court properly imposed multiple sentences for the individual violations committed in pursuit of independent objectives. (See *People v. Coleman* (1989) 48 Cal.3d 112, 162-163; *People v. Nguyen* (1988) 204 Cal.App.3d 181, 190.)

2. Consecutive Sentence

Defendant contends that the trial court violated his rights to due process and a jury trial by imposing a consecutive term on count two based on facts that were not found true by a jury. He claims that the trial court "made its own factual finding that the count two

[7] Defendant's claims notwithstanding, this holding is consistent with our conclusion that the trial court did not prejudicially err in failing to instruct the jury with a unanimity instruction.

charge was a divisible act of 'the assault at the motel' " and that "[b]y making this factual finding based on facts not found true beyond a reasonable doubt by the jury," the trial court committed reversible error.

In *Cunningham v. California* (2007) 549 U.S. 270, 274 (*Cunningham*), the United States Supreme Court held that California's determinate sentencing law violated a defendant's right to jury trial because it assigned to the trial judge, not the jury, the authority to find the facts that exposed a defendant to an elevated upper term sentence. The California Supreme Court, however, has twice held that the principles discussed in *Cunningham* do not apply to consecutive sentencing imposed pursuant to section 669. (*People v. Black* (2005) 35 Cal.4th 1238, 1261-1264 (*Black I*); *People v. Black* (2007) 41 Cal.4th 799, 820-823 (*Black II*).) As our Supreme Court explained in *Black I*, the underlying rationale of the *Cunningham* lineage "is inapplicable to a trial court's decision whether to require that sentences on two or more offenses be served consecutively or concurrently." (*Black I, supra*, 35 Cal.4th at p. 1262, discussing *Blakely v. Washington* (2004) 542 U.S. 296 and *Apprendi v. New Jersey* (2000) 530 U.S. 466, both precursors to *Cunningham*.) "For purposes of the right to a jury trial, the decision whether section 654 requires that a term be stayed is analogous to the decision whether to sentence concurrently. Both are sentencing decisions made by the judge after the jury has made the factual findings necessary to subject the defendant to the statutory maximum sentence on each offense, and neither implicates the defendant's right to a jury trial on facts that are the functional equivalent of elements of an offense." (*Black I, supra*, 35 Cal.4th at p. 1264.)

Similarly, in *Black II*, our Supreme Court held that *Cunningham* and its precursors do not apply to consecutive sentencing decisions. (*Black II, supra*, 41 Cal.4th at pp. 821-823.) In so holding, the court explained that whether the defendant actually should serve consecutive sentences is a " 'sentencing decision[ ] made by the judge after the jury has made the factual findings necessary to subject the defendant to the statutory maximum sentence on each offense' . . . ." (*Black II, supra*, at p. 823, quoting from *Black I, supra*, at p. 1264).

Accordingly, we reject defendant's claim that jury findings were required before the trial court could impose a consecutive sentence.

F. Cumulative Error

Lastly, defendant urges us to apply the cumulative error doctrine on the ground that the trial errors had the cumulative effect of denying him the right to a fair trial. Our review of the record has disclosed no error warranting reversal, whether considered separately or cumulatively. (See *People v. Roybal* (1998) 19 Cal.4th 481, 531.)

"Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice. [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 844 (*Hill*).) "Nevertheless, a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. [Citations.]" (*Ibid.*) "The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.' [Citation.]" (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

For example, in *Hill* the Supreme Court held that pervasive prosecutorial misconduct, along with instructional and other errors, required reversal. (*Hill*, *supra*, 17 Cal.4th at pp. 844-848; see also *People v. Cuccia*, *supra*, 97 Cal.App.4th at pp. 790, 792 [finding prejudicial cumulative error when (1) the defendant was required to either testify out of order or rest his case when a scheduled defense witness could not be located, and (2) the trial court denied the defendant's request to testify on surrebuttal]; *People v. Hernandez* (2003) 30 Cal.4th 835, 871-877 [finding prejudicial cumulative error in the penalty phase of a capital trial when, the "numerous and serious" errors included erroneous admission of evidence about a crime of which the defendant had been acquitted and about fear of the victim of an uncharged murder that the defendant would kill him, and an improper instruction pertaining to others involved in criminal activity with the defendant combined with the failure to instruct the jury on accomplice liability].)

Even though we have found trial errors, we also note that those errors were relatively minor and were not comparable to the pervasive and fundamental errors that occurred in the cases discussed above in which cumulative error has been found to

require reversal. This was not a close case. As we have already discussed, any errors were harmless in light of the evidence of that defendant acted with malice at the time he killed Alicia and because the jury plainly did not believe defendant's testimony. Accordingly, there was no cumulative prejudice to warrant reversal. We are not persuaded, therefore, that the errors, whether considered alone or cumulatively, led to an unfair trial or a miscarriage of justice. (*Hill*, *supra*, 17 Cal.4th at p. 844.)

III. DISPOSITION

The judgment is affirmed.

_____
RUVOLO, P. J.

We concur:

_____
REARDON, J.

_____
SEPULVEDA, J.